UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

WALT DISNEY WORLD CO.

and Case 12–CA–25889

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1625

Christopher C. Zerby, *Esq.*, for the General Counsel.
Peter W. Zinober and *Ashwin R. Trehan, Esqs.*,
for the Respondent.
Richard P. Siwica, Esq., for the Charging Party.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Tampa, Florida, on April 1, 2, and 3, 2009. The complaint issued on October 31, 2008, and was amended on February 10, 2009, and at the hearing.[1] It alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by unilaterally eliminating bargaining unit classifications, unilaterally transferring unit work, and refusing to provide the Union with requested relevant information. The Respondent's answer denies all alleged violations. I find that the Respondent violated the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, Walt Disney World Co., the Company, operates an entertainment complex, Walt Disney World Resort, at Lake Buena Vista, Florida, at which it annually derives gross revenues in excess of $500,000 and purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Company admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Food and Commercial Workers Union, Local 1625, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2008 unless otherwise indicated. The charge was filed on June 26 and was amended on August 28.

II. Alleged Unfair Labor Practices

A. Overview

Walt Disney World is an entertainment complex at Lake Buena Vista, Florida. In addition to its well known theme parks, Magic Kingdom, Epcot, Disney-MGM Studios, and Animal Kingdom, the Company operates 22 resort hotels as well as other attractions. The Company seeks to attract conferences, conventions, and similar events, and it is therefore in competition with various hotels and resorts for that business. Customers, both corporate and individual, may arrange for catered events including weddings, family reunions, conferences, and conventions. This case involves employees represented by the Union who work at those catered events.

The Service Trades Council Union (STCU) consists of six labor organizations that represent employees performing various duties throughout the entertainment complex. The Company and STCU are parties to a master agreement covering all represented employees that is supplemented by various addenda that relate to the wages and working conditions specific to employees represented by the constituent labor organizations that comprise the STCU. United Food and Commercial Workers Union, Local 1625, the Union, represents employees involved in the sale of merchandise and catering. This proceeding relates only to employees involved in catering. At all times relevant to this proceeding, Juleeann Jerkovich was secretary/treasurer of the Union and was its representative in dealings with the Company.

During the relevant time period herein, Ann Williams was Director of Catering and Convention Services for the Company, and Jerry Vincent was Manager of Labor Relations with responsibilities relating to the STCU collective-bargaining agreement. Williams reported to Vice President Rosemary Rose. Vincent reported to Vice President of Labor Relations Phil Bernard. Williams and Vincent both testified at the hearing herein. Rose and Bernard did not testify.

The facts in this case, with few exceptions, are not in dispute. The issues are whether the Company was obligated to give notice to and bargain with the Union regarding the decision to eliminate the unit classifications of banquet captain, bar captain, and bartender and to reassign the work performed by employees in those job classifications and whether the Company failed to provide requested relevant information with regard to its actions.

B. Procedural Matters

At the hearing, Respondent requested I issue a protective order relating to certain documents containing proprietary and financial information. Neither General Counsel nor Charging Party objected, and, on the record, I ordered that General Counsel Exhibit 15, Charging Party Exhibit 1, and Respondent's Exhibits 19 through 24 be subject to the protective order, that they are not in the public domain, and that, with the exception of the portions thereof upon which testimony in this public hearing was taken, could not be disclosed to anyone other than the attorneys of record and officers of the Union and Company. The documents may be accessed by any reviewing authority. I directed the documents subject to my order be placed under seal. The reporting service inadvertently failed to submit Respondent's Exhibits 19-24 under seal. I have corrected that inadvertence. All documents subject to my order are in a separate sealed manila envelope marked "Confidential." My jurisdiction over this proceeding ends with its transfer to the Board. I alert the Board to the presence of these documents in order to assure they are treated as confidential even when sent to the Case Records Unit. See *United Parcel Service*, 304 NLRB 693 (1991).

The Respondent requests that I reverse the decision of the Regional Director not to defer this case to the grievance arbitration procedure of the collective-bargaining agreement. This case involves interrelated issues of modification of the scope of the bargaining unit, transfer of unit work, and failure to provide requested relevant information. "Board policy … disfavors bifurcation of proceedings that entail related contractual and statutory questions." *Avery Dennison*, 330 NLRB 389, 390 (1999). I deny the request to defer this case to arbitration.

C. The Collective-Bargaining Agreement

The current collective-bargaining agreement is effective from April 29, 2007, until October 2, 2010. Article 3 of the STCU master agreement recognizes the STCU as the exclusive collective bargaining representative of full time employees "who are in the classification of work listed in Addendum 'A' at Walt Disney World." Addendum A lists, among other classifications, banquet facility, banquet servers, beverage host/hostess banquets, beverage captain, and food and beverage captain. Informally, the foregoing classifications are referred to as housemen, servers, bartenders, bar captains, and banquet captains.

Article 12, Section 1, of the master agreement, provides as follows:

> The job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in Addendum "A" attached hereto and considered in all respect to be a part of this Agreement.

The master agreement, Article 5, contains a management rights clause that provides, insofar as relevant to this proceeding, as follows:

> Except as expressly and clearly limited by the terms of this Agreement, the Company reserves and retains exclusively all of its normal and inherent rights with respect to the Management [sic] of the business, including but not limited to, its right to select and direct the number of employees assigned to any particular classification of work; to subcontract work, to establish and change work schedules and assignments; … to institute technological changes, including but not limited to, work automation processes and otherwise to take such measures as Management may determine to be necessary to the orderly, efficient and economical operation of the business.

The prior contract contained the same management rights clause.

Article 16, Section 2(b)(2) provides that "[w]henever an employee is assigned or transferred to perform two (2) or more job classifications during the day, the employee will receive his/her permanent rate or the rate for the classification to which he/she was transferred, whichever is higher …."

Addendum B-5 relates to employees represented by UFCW Local 1625, the Union. In addition to provisions relating to merchandise sales personnel, Addendum B-5 addresses the working conditions of employees involved in catered events.

The Catering Payment Policy provides that "[a]ll Resort Catering operations will maintain separate Bartender/Server gratuity pools" and that a 15 percent gratuity will be "calculated on the actual food and beverage price charged to the client." One percent (1%) of the 15 percent gratuity is shared among the housemen. The remaining 14 percent is allocated as follows:

In the server gratuity pool, thirteen and one-half percent (13½ %) is shared by banquet

servers and captains; an additional one-half percent (½ %) is shared among the banquet captains.
In the bartender gratuity pool, thirteen and one-half percent (13½ %) is shared by beverage servers and captains; an additional one-half percent (½ %) is shared among the bar captains.

The Addendum's Staffing Guidelines state that "[m]anagment reserves the right to staff functions as deemed appropriate." The foregoing provision is followed by a boxed statement, "Standard number of Bartenders" and provides for one bartender per 100 guests at functions with an open bar. The prior agreement included the same provision regarding bartenders and had also set out guidelines for banquet captains. That provision stated that the "[s]tandard number of captains" was one captain for functions of between 100 and 250 guests, two captains for functions with from 250 to 500 guests, and three captains for functions with more than 500 guests. An asterisk noted that the parties recognized that the "numbers represent a guideline and may fluctuate from event to event." The current agreement contains no provision specifying a standard number of banquet captains.

Former bartender Jeffery Kemp, who regularly served as a relief bar captain prior to the Company's elimination of captains, was on the negotiating committee of the Union regarding the Addendum. He testified, without contradiction by Manager Vincent, that at the 2007 negotiations, Vincent proposed the elimination of the classification of bartender, that the Union rejected that proposal, and that, at the next negotiating session, Vincent withdrew the proposal.

The Company has administratively separated its catering operations into seven areas: Boardwalk, Contemporary, Coronado Springs, Epcot, Grand Floridian, Hollywood Studios, and Yacht & Beach Club. Each area includes various resort facilities and other locations at which catered events are held. Thus, Epcot includes the Epcot theme park as well as Downtown Disney and Pleasure Island. Employees are assigned to these various locations, referred to as their "home or statused location."

Paragraph 2 in the provision relating to Scheduling provides that servers, bartenders and captains will be scheduled in their home location first and that the "rotation methodology" for scheduling begins "with the most senior Server, Bartender, or Captain respectively." Paragraph 4 provides that captains "will be eligible to be scheduled for remaining Server and Bar shifts locally, prior to being scheduled globally."

Paragraph 13 provides that "[a]ll Banquet Servers, Bartenders, and Captains will not be involuntarily scheduled less than 1560 hours on an annualized basis …. All grievance settlements based on the Company's proven failure to schedule 1560 hours will be paid at the appropriate non-tipped rate of pay."

D. Past Practice

The Company offers a variety of catered events including coffee breaks, which may involve as few as five people, receptions with open bars, and buffet or plated dinners. A Banquet Guest Service Manager is ultimately responsible for every catered event. One manager was often responsible for simultaneously occurring events. Employee Patrick Mullen, a former banquet captain, testified that the manager would check with him to assure that everything was being set up properly, meet the client, i.e., the customer who arranged for the event, and then "be off to their next event." In Mullen's experience a manager would be present at each event, "[t]ypically about 25 percent" of the time."

Director of Catering and Convention Services Ann Williams acknowledged, pursuant to staffing functions "as deemed appropriate," that "as a general proposition, functions which exceeded 100 guests or were especially complicated or demanding would be staffed with one or more of the banquet captains," which is consistent with the guidelines set out in the prior collective-bargaining agreement. The only evidence relating to the absence of assignment of a captain to an event with more than 100 guests was the testimony of John Stafford, who in 2008 was Director of Catering Operations, that a captain would not be assigned to a boxed lunch event involving 300 people.

Labor Manager Rebecca Szapacs, who is responsible for scheduling, testified that the decision regarding the assignment of captains was made by the "leaders in the area." She was unfamiliar with any specific guidelines, but was aware that the assignment of captains was dependent upon "how many guests are on an event, what type of event it is … [and] the different particulars of the event." Former Banquet Captain Mullen, whose home location was at Epcot, testified without contradiction that his area leader informed him that "[a]nything more than 25 people with a bar at Epcot called for a captain."

Although Director Stafford testified that captains were not assigned to approximately 70 percent of catered events at Disney World, there is no evidence contradicting the admission of Director Williams that, "as a general proposition," captains were assigned to events with 100 or more guests. The Company introduced a document, Respondent's Exhibit 25, reflecting the number of events held in the respective resorts and parks for March and the first week of April and the number of those events to which captains were assigned. As already noted, a coffee break involving a few as five people is considered to be an event. As noted in the brief of the General Counsel, the exhibit confirms that captains were assigned to multiple events. The exhibit does not reflect the number of guests at the events to which captains were not assigned. In the absence of evidence to the contrary, there is every reason to believe, consistent with the past practice of the Company, that the events to which captains were assigned were either complicated or had 100 or more guests and that the events to which they were not assigned were uncomplicated and involved fewer than 100 guests.[2]

A booklet titled Food and Beverage Education was presented to the Union by the Company and agreed to by the Union in 2004. Although not incorporated into the collective-bargaining agreement, it sets out standards to be followed by "cast members," the term used by the Company when referring to employees. The booklet also sets out specific responsibilities for banquet captains including ensuring the proper appearance of cast members, being readily available at all times "before, during, and after the function," and remaining at the location until the assigned manager signed off on the captain's check list "and all servers have been checked out."

I need not burden this decision with the minute details of the functions formerly performed by captains. In addition to captains, employees identified as relief captains served as captains when there was an insufficient number of captains available.

Former banquet captain Mullen would normally report three hours before the event, check with the banquet manager regarding any changes of which he needed to be aware, and then review the banquet event order (BEO) sheet and determine who would be assigned to which job tasks. He would review the diagram reflecting the manner in which

[2] I deny the motion of Counsel for the Charging Party to reject Respondent's Exhibit 25.

the event was to be set up and begin obtaining whatever equipment was needed. As the servers arrived, he would confirm that they were appropriately attired with name tags and the "right costume." He would conduct a preshift meeting relating to the event, reviewing the BEO and confirming the menu and any special dietary needs. If necessary for a plated dinner, he would set out a sample place setting. He would then assign the servers to their respective locations and oversee the event, signaling when to begin serving and when to begin clearing, "[p]retty much everything ran on signal."

Jeffrey Kemp, formerly a bartender, explained that, prior to July 2008, he was assigned to work as a relief bar captain about ninety percent of the time. When working as a captain, he would "pull the banquet event orders (BEOs), check for any changes, and make sure that "everything we would need" was on hand. He would check the diagrams to determine how the area, whether inside or outside, was to be set up and where the bars would be located. He would conduct a preshift meeting with the bartenders, reviewing the Company's standards, and then assign the bartenders to their respective locations. Shortly before the event began he would check with the client to see "if they had any special needs," such as opening one bar early for special guests, and then oversee the event, assisting bartenders as necessary and handling any issues such as a guest being "over served" or someone underage attempting to obtain an alcoholic beverage. Following the event he would fill out billing consumption sheets based upon the amount of the various types of beverages consumed both for billing purposes and to assure that the inventory was properly stocked.

Both Mullen and Kemp testified that the foregoing functions are now performed by managers. Their testimony is confirmed by a list provided by Director Stafford to Director Ann Williams which reflects that, upon elimination of the classification of captain, managers rather than captains would be responsible for pre-event tasks including confirming the equipment necessary for the function, making job assignments, conducting the "pre-meal meeting," and assuring "cast accountability." At the event the manager would be responsible for delivering "direction for times of service" and assuring "accountably for proper standards" relating to bar service." After the event the manager would be responsible for inventory and billing. An email from Williams to Vincent dated June 9 notes that "these responsibilities are currently shared."

The Company has a responsible vendor program (RVP) regarding the serving of alcoholic beverages. Many servers have received that training and served as bartenders at functions held in the theme parks and, when there was an insufficient number of bartenders available, at the resorts. When so doing, consistent with Article 16, Section 2(b)(2) of the STCU master agreement, they would have been compensated at the bartender rate and participated in the bartender gratuity pool. Director Williams confirmed, consistent with the provisions in the Addendum relating to Scheduling, as set out in paragraph 2, that bartenders were scheduled based upon seniority and were given first priority to be assigned to work as bartenders at the resorts in their home locations.

E. Facts

On May 5, the Company informed the Union that it was eliminating the classifications of banquet captain, beverage captain, and bartender. On Friday, May 2, Secretary/Treasurer Jerkovich met Manager of Labor Relations Jerry Vincent as she was getting off of an elevator. Vincent asked whether she had received his voice mail message, and she reported that she had not. Vincent informed her that the message related to a meeting that he wished to have on Monday at 9 a.m. relating to "some

restructuring or reorganizing in the catering department." Jerkovich asked whether the matter could be handled by telephone. Vincent replied that it could.

On Monday, May 5, Vincent called Jerkovich at 9 a.m. and informed her that the Company "was going to move forward with some reorganization" regarding classifications of employees represented by the Union, that captains and bartenders were to be eliminated, and the work would be done in the future by managers. I note that Vincent misspoke insofar as the work of bartenders continued to be performed by unit personnel. Jerkovich confirmed that the reorganization included bar captains. Vincent advised that the Company "would be open to effects bargaining" and that the Company was going to announce the reorganization to the affected employees at 2 p.m. that afternoon. He invited Jerkovich to the meeting.

Jerkovich stated that she did not believe that the Company had the right to do what they were proposing and that she would not attend the meeting insofar as it "would look as though we agree with this decision" or were "complicit" in it. She added that the Union did not agree that the only responsibility of the Company was "effects bargaining."

At the May 5 employee meeting, Director Williams informed the affected 27 captains of the elimination of their classification and stated that they could become servers, apply for positions as managers insofar as 24 new manager positions were being created, or place themselves in the labor pool, referred to as Casting, for any available position. She told the nine bartenders they would be "transitioned to a server role" in order to "create consistency with Catering Operations."

Williams did not address the monetary aspects of the foregoing changes, stating that the restructuring was "still being discussed the Union" and that it would be "premature to speculate about the financial implications." The record does not reflect whether Williams acknowledged that certain financial implications were inherent in the Company's actions including elimination of the separate bartender and server gratuity pools, the extra ½ percent gratuity paid to captains, and the separate scheduling by seniority for banquet captains, bar captains, and bartenders, all of which were terms and conditions of employment set out in the collective-bargaining agreement.

On May 7, Jerkovich wrote Manager Vincent complaining that a written description "of what the Company is intending" had been promised, but that she had not received the information. Vincent replied, confirming the elimination of the "Banquet Captain role" and "Bartender role" and stating that the reorganization would occur "during the third week in June." He offered to discuss the "impact on our employees" of the re-organization.

On May 9, Union attorney Richard Siwica wrote Vincent protesting that the Company had no authority to remove bargaining unit work and stating that its obligation was not limited to discussing "the re-organization and its impact." The letter requests information for the purpose of evaluating a possible grievance. Paragraph 3 requests "documents, studies, reports or any other information upon which the Company based their decision to make the change." Paragraphs 5, 6, and 7 seek documents comprising a "Strategy Plan" or "Five Year Strategy Plan" relating to the decision to "restructure" and documents relied upon by the Company to generate and implement the plan.

On May 16, Vincent wrote that the Company would respond by May 21, and he did so by letter stating that the Company "disagrees" with the position of the Union regarding the removal of bargaining unit work and reiterating its offer to engage in bargaining over

"the effects of the elimination" of the classifications. Some of the information requested was provided, including the "message points" that Williams had communicated to the employees on May 5. Regarding the documents sought in paragraphs 3, 5, 6, and 7, the Company responded that the information was the "exclusive property of the Company and is not relevant for the purpose of negotiating the effects of the change."

On June 19, the Union, in a letter from attorney Siwica, sought further information. Paragraph 3 requested information regarding when the decision to eliminate the classifications was made, who made the decision, and all documents relating to the decision to select "these individuals for 'role elimination.'"

On July 2, Vincent replied, providing much of the information sought, but refusing to inform the Union of who made the decision or when the decision to eliminate the classifications was made. The Company continued to decline to provide documents relating to the decision because they were the "proprietary information of the Company."

At the hearing herein, Vincent, who has taken a position with a different employer, acknowledged that the Company made no offer to bargain about the elimination decision or to alter the decision. He offered to bargain only about effects. The Company had already informed the displaced employees of their options, and the elimination of the classifications nullified the contractual provisions relative to those classifications.

Secretary/Treasurer Jerkovich agreed that the Union refused to engage in effects bargaining because the Union claimed that the Company was obligated to bargain about the decisions it had made. Regarding the information requests, Jerkovich explained that the Union was seeking to understand the basis for the Company's decision, the "reason for doing this," as well as "to evaluate a potential grievance that the Union might bring on behalf of the banquet employees that we represented," and "[l]ast, but not least" to have information to prepare for bargaining if we "were to engage in bargaining."

Ann Williams assumed her position as Director of Catering and Convention Services in June 2006. In December 2006, she met with upper management regarding concern that guests' satisfaction ratings had declined. In October 2007, she presented a proposal, WDW Catering Operations, Disney Service, Basic Proposal, to upper management in which she attributed the decline in guest ratings to various factors including time devoted to what she termed as "frivolous grievances" and her belief that "[a]dversarial attitudes [were] encouraged and promoted by" Jerkovich. She proposed eliminating the classifications of captain and bartender and adding 24 Banquet Guest Service Managers. In testimony Williams stated that she believed that there was "a turbulent environment between cast members [employees]"and that the proposed increase in managers would provide "more direct support from the leadership" by increasing "the time that the managers were on the floor to help resolve any issues."

A pilot program was conducted at the Yacht and Beach Club sometime in 2007. William's October 2007 proposal states that the pilot program "has been successful." It notes that the amount of time managers were on the floor was increased "from 50 to 60% to more than 90%." As already noted, in former banquet captain Mullen's experience, managers were present about 25 percent of the time. Former bartender Kemp's home location is the Yacht and Beach Club. He recalled a period in which managers were "more visibly on the floor, but they weren't assigning duties." William confirmed that the "pilot program did not have any effect on the responsibilities of bargaining unit employees at the Yacht and Beach Club."

The October 2007 proposal was refined, resulting in WDW Catering Operations, Disney Service, Basic Proposal, dated January 2008. A copy of what appears to be that proposal was left anonymously at Secretary/Treasurer Jerkovich's home after Vincent's announcement to her on May 5, but before May 9. Williams testified that the document "appears to be" identical to the final version upon which the Company acted. The reference to a "strategic plan" in the Union's first information request was predicated upon language in the document.

Vincent testified that some comment by Jerkovich caused him to believe that the Union had somehow obtained a copy of the proposal prior to May and that he reported his belief to his superiors who in turn reported it to Williams. The Company, in its brief, argues that that "none of the testimony … by Williams and Vincent" regarding their belief that Jerkovich had possession of the document "is controverted," and that the Union waived any right to bargain by failing to request bargaining upon learning of the existence of the reorganization plan. Although the testimony regarding Vincent's belief is uncontroverted, the ultimate fact is specifically controverted. I place no reliance upon Vincent's belief, actually his suspicion. He acknowledged that, in a meeting in late May or early June, Jerkovich confirmed that she had received a copy of what she understood was the document upon which the Company was acting. Jerkovich credibly denied having received the document prior to May 5, and I credit her testimony. Thus, there was no waiver because the Union had no knowledge of the Company's intentions until Vincent announced the elimination decision to Jerkovich on May 5.

Vincent did not provide either the October 2007 or January 2008 WDW Catering Operations, Disney Service, Basic Proposal in response to the Union's information request, and the Respondent failed to include the January 2008 document among the documents provided to Counsel for the General Counsel pursuant to subpoena. I do not fault Counsel for the Respondent in this regard. Counsel can only produce what the client provides. I am, however, disturbed that the Respondent failed to produce this subpoenaed document that was the blueprint for its actions.

The Union, prior to May 5, was unaware of the Company's decision. There is no evidence that Manager Vincent, who was the representative of the Company with whom the Union regularly dealt, ever mentioned any concerns regarding frivolous grievances, Jerkovich's purported adversarial attitude, or turbulence among employees. So far as this record shows, he not involved in any aspects of the decision except announcing it to the Union. Williams testified that the revised proposal of January 2008 was approved sometime in late March. She did not give an exact date nor did she identify who made the decision to eliminate the job classifications and transferred the bargaining unit work.

The elimination of captains and bartenders occurred on June 29 at Boardwalk, Grand Floridian, and Hollywood Studios and on July 6 at Epcot, Contemporary, Coronado Springs, and the Yacht and Beach Club. Functions formerly overseen by captains are now overseen by managers. It appears that two former captains and three relief captains were among those hired into the 24 newly created manager positions. Due to the national economic downturn, only 20 of the new positions were filled. The former captains who did not apply for managerial positions, so far as the record shows, became servers.

Former captains no longer oversee events. They wait on table as servers, as do the former bartenders. The elimination of the bartender classification effectively eliminated the separate bartender and server gratuity pools. The elimination of captains eliminated the

extra ½ percent gratuity paid to them from the respective gratuity pools. Neither captains nor bartenders have priority based upon seniority for work in their separate classifications. Former bartender Kemp, who had worked as a relief bar captain ninety percent of the time and as a bartender the remaining ten percent, became a server. Since July he has been assigned to tend bar, "but not very often."

All servers now share in the 14 percent gratuity remaining after the 1 percent given to housemen. The WDW Catering Operations, Disney Service, Basic Proposal, January 2008, notes that "redistribution of the gratuity pool" will increase the pay of 90 percent of the "Cast population," i.e. the servers who formerly received only 13½ percent.

The Company has continued to pay the employees who formerly occupied the eliminated classifications at their contractually established base rate.

F. Analysis and Concluding Findings

1. The Elimination of the Unit Classifications

The complaint, in paragraphs 6, 7, and 11, alleges that elimination of the unit classifications of banquet captain and beverage captain and transfer of their work to nonunit managers and elimination of the unit classifications of bartenders and transfer of their work to other unit personnel unlawfully altered the scope of the bargaining unit. It further alleges that the alteration of terms and conditions of employment set forth in the collective-bargaining agreement, including but not limited to payment at the highest applicable contractual wage rate for work performed in other classifications, the wage rates prescribed for the eliminated classifications, gratuity distribution, and scheduling priority by seniority in the eliminated classifications, constituted a failure to continue in effect all terms and conditions of employment set forth in the collective-bargaining agreement.

The legal principles involved herein are well settled. The scope of a collective bargaining unit is a permissive subject of bargaining whether the unit was certified by the Board or agreed upon by the parties, and an employer may not alter the scope of the unit "without first securing the consent of the union or the Board." *Hampton House*, 317 NLRB 1005 (1995); *Holy Cross Hospital*, 319 NLRB 1361 (1995). Section 8(d) of the Act requires an employer and union to bargain collectively "in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(d) and longstanding precedent establish that an employer is prohibited "from modifying the terms and conditions of employment established by … [a collective-bargaining] agreement without obtaining the consent of the union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989); *St. Vincent Hospital*, 320 NLRB 42 (1995).

The elimination of the unit classifications of banquet captain, bar captain, and bartender altered the scope of the unit. Although the Respondent continued to pay the employees formerly in those classifications their contractual wage rate, the elimination of the separate bartender and server gratuity pools and the extra ½ percent gratuity paid to captains modified the terms of the collective-bargaining agreement and directly affected the compensation of those employees. As pointed out in the brief of the General Counsel, although the gratuity for servers was increased to 14 percent, that increase was an unlawful midterm contract modification. The bartenders and captains no longer have scheduling priority in their respective classifications. Most significantly, their working conditions were substantively changed. Captains no longer are overseeing functions, they are waiting tables. Bartenders, unless they happen to be assigned to a bar as a server, are no longer mixing and pouring drinks, they too are waiting tables.

The Respondent argues that the management rights clause coupled with the provision in the Addendum that "[m]anagment reserves the right to staff functions as deemed appropriate" gave it the right to eliminate the classifications of captain and bartender. I disagree. As pointed out in the discussion of waiver in *Regal Cinemas*, 334 NLRB 304, 313 (2001), citing precedent, any waiver must meet the "clear and unmistakable standard governing the waiver of statutory rights." The management rights clause herein, which provides that management may "select and direct the number of employees assigned to any particular classification of work," assumes the existence of those classifications in which the employees are to be assigned. Article 12, Section 1, of the master agreement provides that "[t]he job classifications and rates of pay which shall prevail during the term of this Agreement are set forth and contained in Addendum 'A' attached hereto and considered in all respect to be a part of this Agreement." The pay rates of captains and bartenders are set forth therein. Paragraph 13 of Addendum B-5 provides that "[a]ll Banquet Servers, Bartenders, and Captains will not be involuntarily scheduled less than 1560 hours." There is no waiver, clear, unmistakable, or otherwise. The management rights clause relating to the "number of employees assigned to any particular classification of work" contains no language relating to elimination of any classification, and Article 12, Section 1 contains the contractual mandate that the "job classification and rate of pay … in Addendum 'A' … shall prevail" during the term of the collective-bargaining agreement.

The provision in the Addendum that "[m]anagment reserves the right to staff functions as deemed appropriate" assumes the staffing of functions. Captains and bartenders worked consistently in those contractually recognized classifications pursuant the collective-bargaining agreement. What constitutes appropriate staffing is established, at the least, by the scheduling provision of the Addendum which provides for scheduling beginning "with the most senior Server, Bartender, or Captain respectively." Thus, at functions at which alcohol was served, bartenders would be scheduled and assigned and, consistent with the guidelines in the current collective-bargaining agreement, it would normally be appropriate to assign a bar captain if 100 or more guests were to be present. Similarly, consistent with the past practice of the parties, banquet captains would be assigned to complicated functions or functions with over 100 guests. The "as deemed appropriate" provision gives the Respondent the right, within the strictures of the collective-bargaining agreement, to staff a particular function with more or fewer unit employees in their various unit classifications. It does not grant the Respondent authority to eliminate bargaining unit classifications or to transfer bargaining unit work.

The Respondent, citing the decision of the Court of Appeals in *Gratiot Community Hospital v. N.L.R.B.*, 51 F. 3d 1255 (6th Cir. 1995), argues that it has the "right to select the number of employees-including zero-assigned to any classification of work." In that case, the Court of Appeals refused to enforce a portion of the Board's order and held that the provision in the applicable collective-bargaining agreement providing that "[a]ssignments to the Seventy Hour Shift will be made by the Director of Nursing in cooperation with the employees involved" and that "[t]he Director of Nursing will decide the number of assignments and the work areas that will be under the Seventy Hour Shift," gave the hospital the right to abolish the Seventy Hour Shift program by determining that the number of shifts would be "zero." Id at 1260-1261. The foregoing decision does not constitute Board precedent and is inapposite. It addresses the right of the hospital to abolish a program by not assigning shifts. It does not address the elimination of contractually established job classifications or the reality that the Respondent herein was not abolishing the catering functions that it was continuing to staff, albeit not in accord with the collective-bargaining agreement.

Any contention that the contract permitted the Respondent to abolish job classifications unilaterally is belied by the uncontradicted testimony of former bartender Jeffery Kemp that, at the 2007 Addendum negotiations, Vincent proposed the elimination of the classification of

bartender. The Union rejected that proposal. At the next negotiating session, Vincent withdrew that proposal which was a permissive subject of bargaining. If the Respondent genuinely believed that the contract permitted elimination of the classification, there would have been no need to have made that proposal.

Neither the management rights clause nor the staffing Addendum constituted a waiver whereby the Respondent was privileged to abolish the job classifications of captain and bartender, the scheduling priorities applicable to those classifications, the separate gratuity pools, and the ½ percent additional gratuity for banquet captains and bar captains respectively.

The Respondent's decision to eliminate the classification of captain and assign the work of captains to managers did not constitute an entrepreneurial decision relating to the "scope and direction of the enterprise." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981). The Respondent, citing *Noblitt Bros.*, 305 NLRB 329 (1992) and *AG Communications Systems Corp.*, 350 NLRB 168 (2007) argues that the decision did constitute a change in the scope and direction of the enterprise. I disagree. In *Noblitt Bros.*, the new owner formed a telemarketing division and "eliminated the walk-in sales function for the showroom." In *AG Communications Systems Corp.*, two bargaining units were merged after Lucent Technologies acquired A.G. Communications which "ceased to exist as an operating entity."

In the instant case, there was no change in either the scope or direction of the enterprise. The decision herein was a staffing decision. Guests continue to be served at catered functions in the same venues located throughout Disney World. The same equipment is used. The guests are served by the same corps of servers, servers whose numbers have been increased by the addition of the former captains and bartenders. The work of captains continues to be performed, albeit by guest service managers. The work of bartenders continues to be performed without the priority of assignment given to the former bartenders. "[W]hen virtually the only circumstance the employer has changed is the identity of the employees doing the work … the decision did not involve a change in the scope and direction of the enterprise that is exempt from the statutory bargaining obligation." *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1023 (1994). The Respondent's staffing decision herein had an immediate and direct effect upon the working conditions of captains and bartenders, employees represented by the Union whose classifications and working conditions were specifically addressed in the collective-bargaining agreement.

Although managers did perform the same work as captains at functions to which captains were not assigned, the past practice of the parties, consistent with the uncontradicted testimony of former captain Muller and the admission of Director Williams, establishes that, at the least, captains were normally assigned to functions which exceeded 100 guests or were especially complicated or demanding. Applying the direction of the Supreme Court when addressing the issue of work preservation in *NLRB v. Longshoremen ILA*, 447 U.S. 490, 507 (1980), the Board "must focus on the work of the bargaining unit employees, not on the work of other employees who may be doing the same or similar work." The Respondent, when conducting its pilot program, recognized that the organization and oversight of large or complicated functions constituted bargaining unit work and carried out that program at the Yacht and Beach Club without having any effect upon bargaining unit employees.

The Respondent was free to hire additional managers without notice to and bargaining with the Union. It was not privileged to eliminate unit classifications and unilaterally transfer bargaining unit work to those managers. *Hampton House*, supra at 1005.

Elimination of the classification of captains was not necessitated by the hiring of

additional managers. The October 2007 proposal reported that the pilot program "has been a success." That program, according to Williams, was conducted without "any effect on the responsibilities of bargaining unit employees." During that program, former bartender Kemp observed that more managers were "visibly on the floor, but they weren't assigning duties." The Respondent did not address how its determination to have an increased managerial presence necessitated the elimination of captains insofar as the successful pilot program had no effect upon bargaining unit employees.

The Respondent's "message points" in Williams' presentation to the affected employees on May 5 reflect that the bartenders were informed that the rationale for elimination of the bartender classification was to "create consistency with Catering Operations." No further rationale was presented at the hearing herein. As set out in the Addendum to the collective-bargaining agreement, those employees had participated in a separate gratuity pool and had priority with regard to bar assignments at functions at which alcohol was served. The elimination of the bartender classification was unrelated to the work of captains or the assignment of additional managers to catered events. Although the Respondent continued to pay the former bartenders at their former base rate, the elimination of the classification with its higher wage rate deprived servers who were assigned to work as bartenders of that higher rate and their share of the separate bartender gratuity pool. Because bartenders no longer had priority for bartending assignments, the Respondent effectively transferred bargaining unit work from the higher paying bartender classification to the lower paying server classification. See *Lexus of Concord, Inc.*, 343 NLRB 851, 865 (2004).

The decision to eliminate captains and bartenders was not dictated by any emergency, technological change, or other unforeseen event. Discussion regarding the catering operation began in 2006, and the proposal, first presented in October 2007 and revised in January 2008, was not approved until March. Despite the Respondent's belief that its guest service was less than optimal because of a turbulent environment relating to "cast members," frivolous grievances, and an adversarial attitude on the part of Jerkovich, there is no evidence that it sought to address any of those issues with the Union or involve the Union in any discussion in an effort to rectify the perceived problems. The elimination of classifications was not a necessary component of the implementation of the increase in a managerial presence at catered functions as confirmed by the successful pilot program at the Yacht and Beach Club.

The Respondent was not privileged to alter the scope of the unit by unilaterally eliminating the classification of bar captain and banquet captain without the consent of the Union, nor was it privileged to transfer their work to nonunit guest service managers without notice to and bargaining with the Union regarding that decision. The Respondent was not privileged to alter the scope of the unit by unilaterally eliminating the bartender classification without the Union's consent and transferring their work to other unit personnel without notice to and bargaining with the Union regarding that decision. The foregoing alterations in the scope of the unit and failure to bargain with the Union regarding its decisions to transfer unit work violated Section 8(a)(1) and (5) of the Act.

Paragraph 8 of the complaint alleges, in the alternative, that the transfer of bargaining unit work to nonunit personnel was a mandatory subject of bargaining. The "transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work." *Regal Cinemas*, supra at 304. In view of my findings herein, this further basis for finding a violation of the Act would be superfluous.

The foregoing unlawful actions rendered inoperative the contractual provisions relating to those unit employees, including the scheduling priority by seniority of the banquet captains,

bar captains, and bartenders in their separate classifications, the separate bartender and server gratuity pools, and the ½ percent additional gratuity paid to captains. Although the Company has continued to pay the employees who formerly occupied the eliminated classifications at their contractually established base rate, the elimination of the classifications also eliminated the stated wage for those classifications. The elimination of the classifications of captain and bartender also rendered inoperative Article 16, Section 2(b)(2) of the STCU master agreement providing that employees assigned to work in a higher paying classification be paid at the higher rate. Restoration of the classifications must, therefore, also include restoration of the contractual wage rates applicable to those classifications. The foregoing modifications of the collective-bargaining agreement without agreement of the Union violated Section 8(a)(1) and (5) of the Act.

2. The Information Requests

Paragraph 9 of the complaint alleges that the Respondent unlawfully failed and refused to furnish the Union with requested relevant information relating to its decisions to eliminate unit job classifications and transfer unit work. As pointed out in the brief of the General Counsel, Vincent's responses admitted the existence of the requested information but asserted that it was the "exclusive property of the Company and is not relevant for the purpose of negotiating the effects of the change."

I have found that the Respondent was obligated to obtain the consent of the Union regarding its decision to eliminate unit classifications and to give notice to and bargain with the Union regarding its decision to transfer unit work, thus the claim that the information sought was not relevant to effects bargaining has no merit. I am mindful that much of the information that the Respondent should have provided is now available insofar as it has been placed into evidence in this proceeding. Nevertheless, "the duty to supply relevant information is a duty to supply such information in a timely fashion and to provide it to the Union, not to the Board." *Geiger Ready-Mix Co. of Kansas City*, supra at 1033. The Respondent, by failing to provide requested relevant information to the Union violated Section 8(a)(5) of the Act.

I am mindful that several documents responsive to the information request are subject to the protective order that I issued at hearing. They remain so. Charging Party Exhibit 1 has not been authenticated as the actual WDW Catering Operations, Disney Service, Basic Proposal, January 2008. Williams testified only that it "appears to be" identical, not that it was identical. Thus that document, subject to the protective order, must be produced for purposes of authentication. All other documents responsive to the request of the Union that have not been made a part of this record must also be produced including, but not limited to, documents identifying the individual or individuals who made the ultimate decision to adopt and implement the WDW Catering Operations, Disney Service, Basic Proposal, dated January 2008, and the date the decision was made.

Conclusions of Law

1. By altering the scope of the unit by eliminating the classifications of banquet captain, bar captain, and bartender without the consent of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. By failing to give notice to and bargain with the Union regarding its decision to eliminate the classification of captains and bartenders and to assign the work formerly performed by captains to managers and the work performed by bartenders to other unit

personnel, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

3. By modifying the terms and conditions of employment of banquet captains, bar captains and bartenders as set out in the collective-bargaining agreement without the agreement of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

4. By refusing to provide the Union with requested relevant information relating to its decision to eliminate those job classifications and transfer the work performed by employees in those classifications, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having altered the scope of the unit by eliminating the unit job classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) without the consent of the Union, it must restore those classifications.

The Respondent having unilaterally removed employees from the foregoing classifications and transferred their bargaining unit work, it must restore those employees to their classifications and transfer their bargaining unit work back to them.

The Respondent must rescind its modifications of the collective-bargaining agreement and comply with the terms and conditions of employment related to employees represented by the Union as set out in the collective-bargaining agreement unless modification of those terms and conditions of employment are agreed to by the Union.

The Respondent must make whole any employees whose earnings were decreased as a result of the foregoing unilateral changes, including employees who would have received higher wages and tips while serving as relief captains or bartenders, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

The Respondent must provide the Union with all documents not already provided relating to its decision to eliminate the classifications of captains and bartenders and to transfer the work performed by employees in those classifications including, for purposes of authentication, WDW Catering Operations, Disney Service, Basic Proposal dated January 2008, said document to remain subject to the protective order.

In view of the Board's decision in *Glen Rock Ham*, 352 NLRB 516 at fn. 1 (2008), I need not address the request of the General Counsel regarding compound interest.

[3] I am mindful that, as a result of prevailing economic conditions, the revenues of the Respondent have decreased and, therefore, whatever backpay liability might exist may be difficult to calculate. Nevertheless, insofar as calculation may be possible, I do, consistent with precedent, order that all affected employees be made whole.

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Walt Disney World Co., Lake Buena Vista, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Altering the scope of the recognized unit by eliminating the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) without the consent of the Union.

(b) Failing to bargain in good faith with United Food and Commercial Workers Union, Local 1625, as the exclusive collective bargaining representative of employees in its catering operations by unilaterally eliminating the unit classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) and transferring work performed by employees in those classifications.

(c) Modifying the terms and conditions of employment of employees as set out in the collective-bargaining agreement without the agreement of the Union.

(d) Refusing to provide the Union with requested relevant information relating to its decisions regarding the foregoing unilateral changes.
.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days of this order, restore the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender).

(b) Within 14 days of this order, rescind the unilateral changes and restore the employees removed from their classifications of beverage host/hostess banquets (bartenders), beverage captain (bar captain), and food and beverage captain (banquet captain) to those classifications and restore the work transferred from those classifications to the employees in those classifications.

(c) Within 14 days of this order, rescind the unilateral modifications of the collective-bargaining agreement relating to the terms and conditions of employment of employees in all

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

classifications represented by the Union in the catering operation.

(d) Make whole any employees whose earnings were decreased as a result of the unilateral changes plus interest as set forth in the remedy section of the decision.

(e) Provide the Union with all documents not already provided relating to its decision to eliminate the classifications of captains and bartenders and to transfer the work performed by employees in those classifications as set forth in the remedy section of the decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Lake Buena Vista, Florida, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 5, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the protective order entered during the hearing prohibiting the disclosure of certain exhibits be, and the same is, continued in full force and effect and that the exhibits submitted under seal will continue to be maintained under seal.

Dated, Washington, D.C., June 2, 2009.

_____
George Carson II
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT alter the scope of your recognized bargaining unit by eliminating the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) without the consent of the Union.

WE WILL NOT fail to bargain in good faith with United Food and Commercial Workers Union, Local 1625, as your exclusive collective bargaining representative by unilaterally eliminating the unit classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) and transferring the work performed by you who were in those classifications.

WE WILL NOT modify your terms and conditions of employment as set out in the collective-bargaining agreement without the agreement of the Union.

WE WILL NOT refuse to provide the Union with requested relevant information relating to our decisions regarding the foregoing unilateral changes.

WE WILL, within 14 days of the Board's order, restore the classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender).

WE WILL, within 14 days of the Board's order, rescind the unilateral changes and restore those of you who were removed from your classifications of food and beverage captain (banquet captain), beverage captain (bar captain), and beverage host/hostess banquets (bartender) to those classifications and restore the work transferred from those classifications to you.

WE WILL, within 14 days of the Board's order, rescind the unilateral modifications of the collective-bargaining agreement relating to your terms and conditions of employment.

WE WILL make whole any of you represented by the Union in our catering operation whose earnings were decreased as a result of the unilateral changes plus interest as set forth in the remedy section of the decision.

WE WILL provide the Union with all documents not already provided relating to our decision to eliminate the classifications of captains and bartenders and to transfer the work performed by employees in those classifications as set forth in the remedy section of the decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WALT DISNEY WORLD CO.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 E. Kennedy Blvd., South Trust Plaza, Suite 530, Tampa, FL 33602–5824, (813) 228–2641,
Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2662